Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE ..... *Petitioners*

vs.

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission ..... *Respondents*

and CITIZENS FOR CLEAN GOVERNMENT ... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, BY DENYING § 1988 ATTORNEYS' FEES TO A SUCCESSFUL § 1983 LITIGANT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

LIST OF PARTIES

The parties to this case are as follows: Petitioners are Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee. The Respondents are Troy Burris, Chairperson of the Arkansas Ethics Commission, Jack Kearney, Tom Alexander, Rita Looney, and Ben Allen, in their official capacities as members of the Arkansas Ethics Commission. The Intervenor below is an organization known as Citizens for Clean Government.

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OCTOBER TERM, 1998

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE ..... *Petitioners*

vs.

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission ..... *Respondents*

and CITIZENS FOR CLEAN GOVERNMENT ... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS DELIVERED BELOW

An unpublished Order dated August 17, 1998, from the United States Court of Appeals for the Eighth Circuit denying attorneys' fees in the case of *Russell v. Burris*, 978 F.Sup. 1211, (E.D. Ark. 1997), affirmed in part and reversed in part, 146 F.3d 563 (8th Cir. 1998), *cert denied*, No. 98-397 and 98-399 (1998), is printed in its entirety in Appendix A. An unpublished Order dated September 29, 1998, denying rehearing by the panel is printed in its entirety in Appendix C.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Order of the Eighth Circuit Court of Appeals was delivered on August 17, 1998, (see Appendix A). The Petition for Rehearing was denied on September 29, 1998, (see Appendix B). This Petition is filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 reads as follows:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and the Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The Petitioners were denied attorneys' fees sought pursuant to 42 U.S.C. § 1988 by the United States Court of Appeals for the Eighth Circuit. Fees were sought as part of the costs following Petitioners successful appeal from a partially adverse District Court ruling of their challenge to elements of the Arkansas Campaign and Ethics laws.

Petitioners are three individuals and an approved Arkansas Political Action Committee (PAC). Ron Russell is Executive Vice President of the Arkansas State Chamber of Commerce and Associated Industries of Arkansas, Kent Ingram is a businessman and former State Senator, and William R. Austin is a businessman. Mr. Russell and Mr. Ingram are officers of the State Chamber PAC and Mr. Russell and Mr. Austin are officers of Associated Industries of Arkansas Political Action Committee (AIAPAC). The AIAPAC, the PAC Petitioner, is an approved PAC.

Petitioners brought suit in the United States District Court for the Eastern District of Arkansas, Western Division, pursuant to 42 U.S.C. § 1983. They alleged that provisions of Arkansas Campaign Finance law violated either the First Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Principally the Plaintiffs challenged select portions of Arkansas Initiated Act 1 of 1996, which held that contributions to candidates for political office shall not exceed $300 for constitutional offices,[1] and $100 for all other

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[1]Those offices are Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Auditor, Attorney General, and Commissioner of State Lands.

offices per candidate per election. Ark. Code Ann. § 7-6-203. Petitioners challenged a provision allowing a Small Donor PAC to contribute up to $2,500 per election per candidate, while limiting individuals and approved PACs to the $300/$100 limit. Petitioners also challenged a portion of a 1991 Initiated Act which limited contributions to approved PACs to $200 per person per year. Ark. Code Ann. § 7-6-201(9)(b).

After a seven day bench trial, the Trial Court enjoined the $300 limit on contributions to candidates for constitutional offices and the $100 limit to candidates for Justice of the Arkansas Supreme Court and Judge of the Arkansas Court of Appeals. *Russell v. Burris*, 978 F.Sup. 1211 (E.D.Ark. 1997). The Trial Court denied relief on the other challenges.

Petitioners appealed the Trial Court's decision to the United States Court of Appeals for the Eighth Circuit. On June 4, 1998, the Eighth Circuit Court of Appeals issued its opinion striking down Act 1 candidate contribution limits in their entirety as well as the Small Donor PAC limit and the limit on contributions to approved PACs. *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), *cert. denied*, No. 98-397 and 98-399(1998).

Having succeeded in its 42 U.S.C. § 1983 challenge, partially in the District Court and partially in the Court of Appeals, Petitioners filed a supplemental Motion for Attorneys' Fees and Costs in the United States District Court for the services performed at the trial level and a separate motion for attorneys' fees and costs in the United States Court of Appeals for the Eighth Circuit for the services performed on appeal. On August 6, 1998, the United

States District Court, in a well reasoned Order, awarded fees and costs totaling $118,450.[2] A copy of the District Court's opinion is attached as Appendix C. On August 17, 1998, the United States Court of Appeals for the Eighth Circuit, awarded Petitioners costs in the amount of $449.33 and denied attorneys' fees. A copy of the Court's Order is attached as Appendix A. A Petition for Rehearing by the panel with suggestion that it be *en banc* was filed by Petitioners. On September 29, 1998, the United States Court of Appeals denied both the Petition for Rehearing with Suggestion *en banc* (with three Judges who would have granted the Petition) and also denied the Petition for Rehearing by the panel. A copy of the Court's Order is attached as Appendix B. This Petition for Writ of Certiorari is from the denial of attorneys' fees by the United States Court of Appeals for the Eighth Circuit.[3]

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[2] This Order is now on appeal to the United States Court of Appeals for the Eighth Circuit.

[3] Another suit was brought attacking Initiated Act 1 by the Arkansas Right to Life Committee in the United States District Court for the Western District of Arkansas, *Arkansas Right to Life State Political Action Committee v. Butler*, Case No. 98-1215 and 1218. That suit, by unrelated Plaintiffs, challenged some of the same provisions as the instant case in chief and also challenged other provisions of Arkansas law. The Trial Court in the Western District of Arkansas struck the $300 limit for Governor and the Ethics Commission members appealed. The United States Court of Appeals affirmed and remanded. [*Arkansas Right to Life Political Action Committee v. Butler*, 146 F.3rd 558 (8th Cir. 1998). The Appellees in that case sought § 1988 attorneys' fees which were likewise denied. A copy of the Order denying fees is attached in the Appendix as Appendix D.]

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, BY DENYING § 1988 ATTORNEYS' FEES TO A SUCCESSFUL § 1983 LITIGANT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In denying Petitioners' § 1988 Motion for Attorneys' Fees following a successful § 1983 challenge, the United States Court of Appeals said:

> The Court denies in all other respects the Appellees original Motion for fees and costs. See *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994), *affid, sub nom Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996), *per curiam*. (Appendix B)

No further explanation for the denial of fees was given.

In relying on *Thorsted* for justification for denying attorneys fees, the Eighth Circuit has joined the Ninth Circuit in deviating to such an extent from relevant decisions of this Court as well as from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power to review this decision.

The District Court in *Thorsted* identified seven (7) special circumstances it used to justify its denial of fees. Not all of these seven special circumstances were present in the instant case, but, even if they were, both the Ninth and the

Eighth Circuits have thwarted the congressional intent to allow fees to successful Civil Rights litigants.

The statute authorizing the award of attorney's fee is clear. Title 42 U.S.C. § 1988(b) provides:

> . . . In any action or proceeding to enforce a provision of section . . . 1983 . . ., the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

By denying fees, the Eighth Circuit has adopted a standard in the exercise of its discretion, that is so far afield from the "special circumstances" exceptions previously approved by this Court to constitute an abuse of discretion. In effect, the Ethics Commission argues that the Eighth Circuit has made the special circumstances in *Thorsted* black letter law requiring the denial of attorney fees. After the Eighth Circuit's Order in this case, the Ethics Commission filed a Motion to Reconsider the original District Court Order awarding attorneys' fees based solely on the Eighth Circuit's Order now before the Court.

Courts have also held that, "the extent of Plaintiff's success is a crucial factor in determining the proper amount of an award" of such fees. *Id.* at 440. In this case, Petitioners were almost totally successful.[4]

The Courts have consistently held that the shifting of

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[4] Petitioners were found to lack standing to challenge the $500 contribution limit to an Independent Expenditure Committee. Also, their challenge to the statute authorizing local governments to set lower contribution limits was not ripe.

attorney's fees under § 1988 is to ensure "effective access to the judicial process" for persons with Civil Rights grievances and a prevailing Plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court said:

> In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court reaffirmed the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary. In response Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizing the district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation. The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 94-1588, p.1 (1976). Accordingly, a prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " S. Rep. No. 94-1011, p. 4 (1976) [quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)]. *Hensley v. Eckerhart*, 461 U.S. 424 (1983) at p. 429.

In its Order denying attorneys' fees, the Eighth Circuit gives no reasoning nor rationale. It simply cites *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994), *affid, sub nom Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996). *Thorsted* involved State of Washington Initiative Measure 573, that imposed term limits on incumbent members to the United States Congress elected from Washington. The District Court declined to award the Plaintiffs' attorneys' fees even though the Court found that enforcement of the

codified initiative would deprive the Plaintiffs of their constitutional rights. The District Court in *Thorsted* held that there were special circumstances present in *Thorsted* that would render unjust an award of attorneys' fees. The Ninth Circuit, in affirming, only found that there was no abuse of the discretion by the District Court, but cautioned that no circumstance identified, standing alone, would be sufficient to deny fees.

The District Court, in its opinion addressing the same arguments based on *Thorsted* and rejecting them, pointed out that,

> the purpose of § 1988 is to encourage enforcement of the Civil Rights Act by compensating those persons who bring meritorious actions. Such persons are thought to be advancing the public interest[,] *Pickett v. Milam*, 579 F.2d 11 18, 1121 (8th Cir. 1978), and has emphasized that 'a court's discretion in denying fees to a prevailing party under section 1988 is narrow.' *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. 1.*, 17 F.3d 260, 262 (8th Cir. 1994) [citing *Hatfield v. Hayes*, 877 F.2d 717, 719 (8th Cir. 1989)]. This is because the 'special circumstances' exception was judicially created, and does not appear in the language of § 1988. *Hatfield*, 877 F.2d at 720. Indeed, the court has stated that '[p]revailing parties ordinarily should recover section 1988 fees unless special circumstances would make such an award unjust,' *Little Rock Sch. Dist.*, 17 F.3d at 262-63, and that '[a] strong showing of special circumstances is necessary to support a denial of attorney fees.' *Hatfield*, 877 F.2d at 719 (quoting *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469,1474 (10th Cir. 1985)). '[T]here are few cases denying attorney fees to a prevailing party as unjust under § 1988.' *J & J Anderson*, 767 F.2d at 1474.

The District Court then discussed two cases where the Court had found special circumstances making an award of attorneys' fees unjust. In *Rose v. Nebraska*, 748 F.2d 1258 (8th Cir. 1984) there were multi-defendants in a case brought by the parent of a handicapped child under § 1983 and the Education For All Handicapped Children Act. The Court found that a fee award against the Governor would be unjust because the Governor had no personal involvement with the dispute. The Court further found an award against the defendant local school district unnecessary because a fee award against other defendants would fully compensate the plaintiff to the extent required by law. The Eighth Circuit had held that normally a state official carrying out state law found unconstitutional is liable for fees under § 1988.

The second case, *Little Rock School District v. Arkansas State Board of Education*, 928 F.2d 248 (8th Cir. 1991), involved a finding that an attorneys' fee award against the Board would be unjust. The special circumstances found there, however, were not present in this case either, as in that case counsel had already been granted a large sum, not based on hours of work actually expended, and that the Intervenors, not the State, provided the most opposition to the prevailing party.

The District Court pointed out that the *Thorsted* opinion in the Western District of Washington was the sole opinion found involving a voter initiative and denial of attorneys' fees under § 1988. But for the denial by the Eighth Circuit of fees in *Arkansas Right to Life State Political Action Committee v. Butler*, Appendix D, handed down on the same date as the denial of fees in this case, the undersigned has found no other case involving a voter initiative and denial of attorneys' fees under § 1988. To the contrary, the Order of

the Court conflicts with the attorney fee awards in successful challenges to voter initiative cases in the Eighth Circuit. See Appendix E an unpublished Order following *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 2579 (1996), the attorney fee award in an unpublished Order, Appendix F, in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1995) and the supporting Affidavits from Bruce La Pierre, Appendix G and Patrick Deaton, Appendix H.

In exercising its discretion, and after reviewing the seven special circumstances in *Thorsted*, the District Court found that the purpose of § 1988 is to encourage enforcement of the Civil Rights Act by compensating those persons who bring meritorious actions and that an award of attorneys' fees would serve that purpose. Petitioners, of course, agree with the District Court, and submit that the Eighth Circuit deviated from the statute and precedent of this Court in embracing *Thorsted*. It certainly deviated from prior rulings in the Eighth Circuit where award of attorneys' fees were made in voter initiative cases.

The *Thorsted* Court relied upon seven special circumstances in denying attorney's fees:

1. No award is needed to serve the purpose of Section 1988, which is to assure "effective access to the judicial process," as this is not a typical civil rights case. The mere filing of suit by anyone with standing would have assured a full court test.

2. No relief was won under Section 1983 claims beyond that already awarded under the constitutional claims.

3. The legislation that prompted the suit was adopted by a voters' initiative, not by State officials. The deterrence purpose of Section 1983 is inapplicable.

4. The defendant officials have not yet enforced Initiative 573. Their willingness to do so if it is upheld reflects only the minimum their oaths of office require.

5. The State officials have acted in good faith.

6. This is a case of first impression in federal court, and the public interest requires that it be adjudicated through a full adversary process. The State defendants have done nothing to increase the litigation costs beyond what would have been necessary in any event.

7. There was no way for the State officials to settle the case by agreement. Even if a stipulation of unconstitutionality had been entered (a most unlikely event), the court would have rejected it. State legislation is presumed constitutional until the contrary is shown.

Most of these circumstances do not apply to this case.

1. The mere filing of this action would not have assured a full court test. Standing is a threshold issue in any suit. In *Thorsted* any voter or citizen could file a suit and have standing as *Thorsted* was a challenge to term limits. In this case, only one would have standing who contributed more in the past and resolved to contribute more in the future than the limits imposed by Initiated Act 1, was a member of a PAC and desired to be able to contribute more than the limits to it, was an officer of a PAC that desired to contribute higher than the limits of the Initiated Act, and was an officer of a PAC limited in its ability to contribute by the Act in comparison to a Small Donor PAC. The Eighth Circuit affirmed the District Court's finding that Petitioners did not have standing on one issue. If Petitioners had not had special standing as past contributors in excess of the newly imposed limits and probable contributors in the future and

as past candidates who had received contributions in excess of the new limits, they would not have been able to bring this action.

In addition, Petitioners did not prevail on all issues raised in District Court. It took an appeal to the Court of Appeals to prevail on the major issues. Denying attorney's fees for the appeal will discourage perseverance in protecting constitutional rights in the future.

2. The *Thorsted* Disrict Court's special circumstance number two (2) was that no relief had been won under § 1983 claims beyond that already awarded under constitutional claims. These are not separate causes of action. This case was only brought under 42 U.S.C. § 1983. Upon a finding that portions of the Act were unconstitutional, a permanent injunction was granted. There is no requirement in 42 U.S.C. § 1988(b) other than that the party prevail under § 1983 in order for the Court to exercise its discretion and award attorney's fees. Even if *Thorsted* was correct that there were separate causes of action, in this case the only relief sought and granted was under § 1983.

Further, the Eighth Circuit, in *Hatfield v. Hayes*, 877 F.2d 717 (8th Cir. 1989) stated:

> Prevailing parties in actions to which a fee-shifting statute applies, then, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 890 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). "[A]bsent special circumstances, a prevailing party should be awarded section 1988 fees *as a matter of course*." *Kirchberg v. Feenstra*, 708 F.2d 991, 998 (5th Cir. 1983) (emphasis in original). Appellate

review of a denial of § 1988 attorney's fees is governed by the abuse of discretion standard, but a district court's discretion in denying attorney's fees to prevailing parties is narrow. *See Jenkins v. Missouri*, 838 F.2d 260, 267 (8th Cir. 1988) (district court's discretion in determining when special circumstances exist is narrowly limited).

3. The First Amendment to the U.S. Constitution is not affected by the method of the adoption of the State Statute in violation of the Constitution. First, the voters may no more violate the Constitution than the legislature. *Citizens Against Rent Control*, 454 U.S. at 295, 102 S.Ct. at 436-37, *Carver, supra*, at p. 144. Knowing that the Court will award attorney's fees to successful challengers under § 1983 will deter the voters from proposing unconstitutional Acts. It will also deter the state legislature from imposing unconstitutional statutes knowing that a constitutional challenge under § 1983 and attorney's fees under § 1988 will follow. The denial of fees in this case is contrary to previous decisions which encourage enforcement of the Civil Rights Act by compensating those persons who bring meritorious actions. *Pickett v. Milam*, 579 F.2d 1118, 1121 (8th Cir. 1978).

4. Arkansas has conducted two elections[5] under the restrictions imposed by Initiated Act 1 and the limitation of $200 contributions to PACs have been enforced since 1990. The Ethics Commission publicly stated they intended to enforce the restrictions imposed by Initiated Act 1 and the limitation of $200 contributions to a Political Action Committee imposed by Initiated Act 1 of 1990. Section 1988 does not require a violation to occur before fees are awarded.

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[5]The 1988 primary election and a 1997 special election for State Senate and Representatives.

5. The Court in *Thorsted* cited *Teitelbaum v. Sorensen*, 648 F.2d 1248, 1250 (9th Cir. 1981), for the proposition that the "good faith" of the public officials constitutes a special circumstance. *Teitelbaum* restricts that proposition to awards against public officials individually, not to officials in their public capacity. All the defendants in *Russell v. Burris* were sued in their official capacities and not as individuals.

This Court also made this distinction in *Hutto v. Finney*, 437 U.S. 678, *see also* 98 S.Ct. at 2575-79, *see also Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). *Pickett v. Milam*, supra at p. 1120- 1121.

6. *Thorsted*'s special circumstance no. 6 is also not applicable. *Russell v. Burris* is not a case of first impression. *Carver v. Nixon, supra*, was an almost identical case arising out of a Missouri initiative. In this case, Petitioners relied on *Carver* and filed a Motion for Summary Judgment. The District Court called it a close call, but denied the motion. In any event, the State in this case presented a unique defense based on the perceived appearance of corruption caused by the total of all legal contributions[6] from the business community rather than by large political contributions. This theory was rejected by the Eighth Circuit.

7. There is no way for a state official to settle a dispute of this nature by agreement, as state officials must defend all state laws. To adopt this reasoning as a special circumstance emasculates § 1988 and will prohibit attorney's fees from ever being awarded in cases attacking unconstitutional statutes or state constitutional provisions.

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[6] Prior to Initiated Act 1, campaign contributors were limited to $1,000 per candidate per election. There was no proof of any contribution over $1,000.

If this decision stands, it will have a chilling effect on any litigant who chooses to challenge a state statute or a state constitutional provision under § 1983. The purpose of § 1988 is to encourage "private Attorney Generals" to pursue these matters, because the Attorney General of the state is bound to defend the laws of the state and is not available to challenge those laws. Therefore it is just to award attorney's fees to a prevailing party on a § 1983 claim when state statutes are challenged.

The Petitioners in this case challenged a popular Campaign Finance Reform Measure approved by the people of Arkansas by a substantial majority. They did this to protect their First Amendment Rights as well as the rights of all other citizens of Arkansas. Their success was substantial. If these successful Petitioners are forced to bear their own attorneys' fees, few aggrieved parties will be in a position to advance the public interest. Few individuals can afford to finance this type of litigation and groups are difficult to put together to contribute to a litigation fund when over sixty percent of the people are in favor of the initiative. In hindsight, these Petitioners would probably not have filed this action had they known that § 1988 fees would not be available. If the Court allows this Oder to stand, coupled with the Ninth Circuit decision in *Thorsted*, then other Circuits are sure to follow. Of course this decision may have such a chilling effect that Civil Rights challenges will not be brought to unconstitutional acts. It is respectfully submitted that the Court should accept this case to clearly state under what limited circumstances fees can be denied, and when § 1988 fees cannot be denied.

CONCLUSION

For the foregoing reasons, certiorari should issue to the United States Court of Appeals for the Eighth Circuit so that this Court may review and correct the decision below and clarify the circumstances where the denial of an award of attorney's fees is appropriate to a prevailing party in a civil rights case and when denial of fees is not appropriate.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3922/4033/4038

Ron Russell, et al.,	*	
	*	
Appellants,	*	Appeals from the United States District Court for the Eastern District of Arkansas
vs.	*	
	*	
Troy Burris, et al.,	*	
	*	
Appellees.	*	

The court grants the motion of appellees Burris, Looney, Allen, and Kearney for leave to file late objections to the appellants' motion for fees and costs.

The court directs the clerk to file the objections of appellee Citizens for Clean Government to the appellants' motion for fees and costs.

The court directs the clerk to file the appellants' reply brief.

The court grants in part the appellants' motion for fees and costs. The court awards $449.33 in costs to the appellants. *see* 8th Cir. R. 39A(a) and *Miller-Wohl Company, Inc. v. Commissioner of Labor and Industry*, 694 F.2d 203 (9th Cir. 1982), *see also United States v. State of Michigan*, 940 F.2d 143 (6th Cir. 1991), and *Morales v. Turman*, 820 F.2d 728 (5th Cir. 1987), to be assessed only against defendants Burris, Looney, Alexander, Allen, Kearney, Russell, Delph, and Wilson. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). The court denies

in all other respects the appellants' motion for fees and costs. *See Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996) (*per curiam*).

August 17, 1998

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3922/4033/4038EARL

Ron Russell, et al.,

Appellants/Cross-Appellees,

vs.

Troy Burris, etc., et al.,

Appellees/Cross-Appellants

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMilliam, Judge Richard S. Arnold, and Judge Kelly would grant the suggestion.

The petition for rehearing by the panel is also denied.

September 29, 1998

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE — PLAINTIFFS

v. No. LR-C-97-0089

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission, and CANDY SUE RUSSELL, MARVIN DELPH, RITA LOONEY, and NORTON WILSON, in their official capacities as members of the Arkansas Ethics Commission — DEFENDANTS

and

CITIZENS FOR CLEAN GOVERNMENT — DEFENDANT-INTERVENOR

ORDER

Pending is the Plaintiffs' Amended Motion For Award Of Attorney's Fees And Costs relating to its lawsuit seeking declaratory judgment and an injunction against enforcement of Arkansas Initiated Act of 1996, which amended Arkansas campaign contribution laws. The Plaintiffs brought their action under 42 U.S.C. § 1983 for alleged constitutional violations. This Court conducted a seven-day bench trial in September 1997, and on October 3, 1997, entered an Order granting the Plaintiffs' motion in part and denying it in part. In an opinion dated June 4, 1998, the Eighth Circuit affirmed in part and reversed in part, finding for the Plaintiffs on certain issues they had lost at trial. *See Russell v. Burris*, 1998 WL 289879 (8th Cir.).

The Plaintiffs' Motion is made pursuant to Federal Rule of Civil Procedure 54, and the fee shifting provisions of 42 U.S.C. § 1988(b). In support of their claim, the Plaintiffs explain they prevailed on four claims: (1) their attack on Act I's $300 contribution limitation for statewide races; (2) their opposition to the Act's $100 limit on contributions to candidates for all other offices; (3) their attack on the $200 contribution limit to approved Political Action Committees (PACs); and (4) their argument against higher contribution limits for small donor PACs. The Plaintiffs, counsel Robert D. Smith, III, was assisted by attorneys John R. Pagan and Tom Tanner. Mr. Smith asserts that 95% of his and his assisting counsels' time was devoted to the issues on which the Plaintiffs ultimately prevailed.

The Plaintiffs request an award of attorneys' fees and costs totaling $160,409.97. Of this total, $157,150 represents attorneys' fees, $3,074.20 is attributable to the fee and expenses of the Plaintiffs' expert witness, and $185.77 represents filing fees and mailing costs.

The Defendant Arkansas Ethics Commission (Commission) and Intervenor Citizens For Clean Government (Citizens) object to the Plaintiffs' Motion. They argue this case presents special circumstances that weigh against the Plaintiffs' recovery of attorneys fees. If the Court determines the case warrants some fee award, the Commission and Citizens contend the Plaintiffs' request must be reduced because it is excessive. Citizens state that any award against them is improper because they are intervenors in good faith. Citizens further argue that the Court, in its October 3, 1997 Judgment, has already exercised its discretion under § 1988 in ordering the parties and intervenor to bear their own costs.

Award of Attorneys' Fees Under § 1988

Title 42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The United States Supreme Court addressed the shifting of attorneys' fees under § 1988 in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court declared:

> The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 94-1558, p.1 (1976). Accordingly, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. No. 94-101 1, p.4 (1976) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

Id. at 429 (some citations omitted). The Court held that the "extent of a plaintiff's success is a crucial factor in determining the proper amount of an award" of such fees. Id. at 440.

The Commission and Citizens argue this case presents "special circumstances" that would render unjust an award of an attorney's fee. They cite in support *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), *aff'd sub nom Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996), a case decided on facts similar to those at issue here. *Thorsted* involved State of Washington Initiative Measure 573, that imposed term limits on incumbent members of the United States Congress elected from Washington. The court found enforcement of the codified initiative would deprive

the plaintiffs of constitutional rights. The court, however, declined to award the plaintiffs attorneys' fees, and detailed factual findings supporting its conclusion that special circumstances would make an award of fees unjust.

The *Thorsted* court first noted that no award was necessary to serve the purposes of § 1988, that is, ensuring access to the judicial process. The court concluded the case was "not a typical civil rights case[,]" and a full court test would have resulted from "the mere filing of suit by anyone with standing." Id. at 1084.

The court next stated that no relief had been won under the plaintiffs' 1983 claims that had not already been won under the constitutional claims.

Third, because the disputed legislation was adopted by voter initiative, not by State officials, the court found the deterrence purpose of § 1983 was inapplicable. *Id.* (citing *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

Fourth, the court noted that the defendant State officials had not yet enforced the initiative.

Fifth, the court found State officials had acted in good faith, and stated that "good faith is one factor of several that a court may consider in applying [§ 1988]." *Id.* [quoting *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir. 1981)].

Next, the court observed that the case was one of first impression in federal court, and that the public interest

necessitated adjudication through a full adversary process. It noted the State defendants had "done nothing to increase the litigation costs beyond what would have been necessary in any event." *Id.*

Finally, the court declared that because "state legislation is presumed constitutional until the contrary is shown," there was no avenue for State officials to settle the case by agreement, and that "[e]ven if a stipulation of unconstitutionality had been entered (a most unlikely event), the court would have rejected it." *Id.*

The court then announced as conclusions of law that: (1) the case presented "special circumstances" within the meaning of *Hensley v. Eckerhart* and an award of attorney fees would be manifestly unfair; (2) the totality of the circumstances presented made the case distinguishable from "cases holding that particular mitigating factors are insufficient to avoid a fee award"; and (3) the plaintiffs' applications for attorney fees should be denied.

In affirming the district court's ruling, the Ninth Circuit noted concerning the denial of an award of attorney fees, that "several of the circumstances identified by the district court would be insufficient, standing alone, to warrant a denial of fees. We hold, however, that the district court did not abuse its discretion by denying fees based on the totality of the circumstances it identified." *Thorsted v. Munro*, 75 F.3d 454, 456 (9th Cir. 1996).

The Eighth Circuit has instructed that "[t]he purpose of section 1988 is to encourage enforcement of the Civil Rights Act by compensating those persons who bring meritorious actions. Such persons are thought to be advancing the public interest[,]" *Pickett v. Milam*, 579 F.2d 11 18, 1121 (8th Cir. 1978), and has emphasized that "a court's

discretion in denying fees to a prevailing party under section 1988 is narrow." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. 1.*, 17 F.3d 260, 262 (8th Cir. 1994) (citing *Hatfield v. Hayes*, 877 F.2d 717, 719 (8th Cir. 1989)). This is because the "special circumstances" exception was judicially created, and does not appear in the language of § 1988. *Hatfield*, 877 F.2d at 720. Indeed, the court has stated that "[p]revailing parties ordinarily should recover section 1988 fees unless special circumstances would make such an award unjust," *Little Rock Sch. Dist.*, 17 F.3d at 262-63, and that "[a] strong showing of special circumstances is necessary to support a denial of attorney fees." *Hatfield*, 877 F.2d at 719 (quoting *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469,1474 (10th Cir. 1985)). "[T]here are few cases denying attorney fees to a prevailing party as unjust under § 1988." *J & J Anderson*, 767 F.2d at 1474.

The Eighth Circuit found special circumstances making award of attorney fees unjust in *Rose v. Nebraska*, 748 F.2d 1258 (8th Cir. 1984). *Rose* involved a multi-defendant case brought by the parent of a handicapped child under § 1983 and the Education for All Handicapped Children Act. The *Rose* court found that a fee award against the Governor would be unjust because the Governor had no personal involvement in the dispute. The court further found that an award against the defendant local school district was unnecessary because "[o]ther parties, the commissioner of Education and the members of the State Board of Education, are in the case, and a fee award against them will fully compensate the plaintiff to the extent required by law. . . . Normally, a state official carrying out state law found unconstitutional is liable for fees under § 1988, but here other state officials are present in the case with a much more direct connection to the very part of the state process that raised the federal-law issue on which plaintiff prevailed." *Id.* at 1264.

In *Little Rock School District v. Arkansas State Board of Education*, 928 F.2d 248 (8th Cir. 1991), the court found unjust an award of attorney fees against the Board. The court listed a number of reasons, which, taken together, it considered amounted to special circumstances. Among the reasons were: that counsel had already been granted a large sum, on a basis not tied to hours of work actually expended; intervenors, not the State, provided the most opposition to the prevailing party; and, the State acted as an adverse party in only one discrete part of the case.

The *Thorsted* opinion of the Western District of Washington was the sole opinion this Court found involving a voter initiative and denial of attorney fees under § 1988. The Court considers *Thorsted* well-reasoned, and agrees that the circumstances surrounding a voters' initiative do not present a typical civil rights case. Moreover, the Court does not disagree with the Commission's and Citizen's argument that the Plaintiffs here are neither disadvantaged nor unique. While this Court can think of many reasons why a denial of attorney fees to the plaintiffs in this case may be reasonable or justifiable, it does not believe that the totality of circumstances presented here would render an award of attorney fees unjust. The purpose of § 1988 is to encourage enforcement of the Civil Rights Act by compensating those persons who bring meritorious actions. An award of attorney fees here would serve that purpose. No other State actors with a more direct connection to the state process are involved. The Court concludes that the "narrow" discretion allowed courts in denying attorney fees under § 1988 is too restrictive to permit a denial here.

Calculation of Attorneys' Fees

Having decided that an award of attorney fees is appro-

priate, the Court must decide the amount. The Court initially finds, consistent with its Judgment, that Plaintiffs are to pay their own costs, i.e., filing fees totaling $150.00, and postage charges of $35.77. Additionally, the Plaintiffs' claim under § 1988 for expert witness fees totaling $3,074.20, is denied. The Commission cites *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 99-100 (1991), where the Court found § 1988 provided no authority to shift expert fees, although it recognized such authority under §§ 1920 and 1821 to allow a witness attendance fee of $40 per day for expert witnesses. The Civil Rights Act of 1991 legislatively reversed *West Virginia University Hospitals* in part by amending 42 U.S.C. § 1988 and Title VII to allow the award of expert witness fees as a part of attorney's fees. *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1306 (N.D. Cal. 1992). The amendment to § 1988, however, restricts a court's discretion to make such awards to cases brought under 42 U.S.C. §§ 1981 (equal rights to make and enforce contracts) and 1981 a (discrimination in employment). 42 U.S.C. § 1988(c). The Plaintiffs here brought their action under 42 U.S.C. § 1983.

The Court concludes that this case is one where much of counsels' time was "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a cwm-by-claim basis." *Hensley*, 461 U.S. at 435. Accordingly, the Court will "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* The *Hensley* Court instructed that in cases, as this, where the "plaintiff has achieved only partial or limited success. . . [,] the most critical factor is the degree of success obtained." *Id.* at 436. The Court notes that any fees rewarded must be "reasonably expended," and that no award should include services that were redundant, inefficient, or unnecessary. *Id.* at 434. *See also Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997).

The parties appealed this Court's rulings and obtained additional relief Accordingly, this Court's analysis of the Plaintiffs' overall success considers all issues on which they prevailed both at trial and upon appeal. *See Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984) (increasing the district court's award of attorneys' fees to reflect a plaintiff's success on appeal).

The Plaintiffs' complaint may be seen as alleging six counts challenging the following provisions of Act I and pre-existing Arkansas law: (1) the $300 per election, per candidate limit on contributions to candidates for statewide office; (2) the $100 per election, per candidate limit on contributions to candidates for other offices; (3) the disparity between limits on contributions to candidates applicable to small donor PACs ($2500 per election, per candidate) and to regular PACs ($300 or $100 per election, per candidate); (4) the $200 limit on contributions to regular PACs; (5) the $500 limit on contributions to independent expenditure committees; and (6) the provision allowing local governments to set contribution limits lower than those set by state law. After trial and appeal, the Plaintiffs are the prevailing party on issues (1), (2), (3), and (4). This Court ruled, and was affirmed on appeal, that the Plaintiffs lacked standing to assert issue (5), and that issue (6) was not ripe for adjudication.

The parties' arguments indicate that the principal contested issues in the case were those relating to limits on contributions to candidates. The Court agrees. The Court takes issue, however, with the Plaintiffs' assessment that 95% of their attorneys' time was spent on ultimately prevailing issues. Based on a review of the Plaintiffs' attorneys' time summaries, the parties' pleadings, and the trial transcripts, together with observations made during trial, the Court believes that this percentage under-

estimates the plaintiffs' attorneys' time spent on issue (5), the limit on contributions to independent expenditure committees. For example, of the 24 pages of the Plaintiffs' brief in support of their motion for summary judgment, 9 pages are devoted to that issue. Similarly, of the 23 pages of text in the Plaintiffs' trial brief, 9 pages addressed the issue. More than 2 of the 11 pages of text in the Plaintiffs September 12, 1997 trial brief concerned the independent expenditure committees. After reviewing the evidence, the Court determines that 25% of the Plaintiffs' attorneys' time is properly attributable to the issues involving independent expenditure committees and the ability of local governments to set lower contribution limits. The Plaintiffs' attorneys' fee will be reduced accordingly.

Commission objects specifically to Mr. Tanner's fee and hourly rate. It argues Mr. Tanner did not participate actively in the trial, and was present at trial primarily to assist with exhibits. The Commission complains that Mr. Tanner's hourly rate should be reduced to that of a paralegal, and because the Plaintiffs have not provided the necessary information on which to base such a reduction, the Court should award nothing for Mr. Tanner's fees. Contrary to the Commission's position, it appears from Mr. Tanner's affidavit that the legal work he performed for the Plaintiffs was reasonable and consistent with his duties as an attorney assisting Mr. Smith in this case. Moreover, the Court recollects Mr. Tanner's assistance to Mr. Smith at trial appeared to be that of assisting counsel; for example, on numerous occasions, Mr. Smith consulted with Mr. Tanner during witness examination.

The Commission also objects to a number of the Plaintiffs' attorneys' allocation of time as unnecessary and unreasonable. For instance, the Commission objects to a claim for 61 hours of work performed before Initiated Act

I was passed, 48 hours for the Plaintiffs' reply to the Defendants' summary judgment motion, and 39 hours for the Plaintiffs' post-trial brief.

The Court believes the Plaintiffs' attorneys are entitled to fees for time spent preparing the claim, even prior to the vote on Act I. Whether the time was spent before or after the election is not relevant, if the time was reasonably devoted to preparing a lawsuit to challenge the proposed initiative.

After carefully reviewing the attorneys' time summaries, however, the Court agrees that the Plaintiffs' attorneys claimed too much time on the Plaintiffs' reply to the Defendants' response to the motion for summary judgment, and on the Plaintiffs' trial and post-trial briefs. A comparison of the Plaintiffs' motion for summary judgment and their subsequent trial brief reveals that most of the latter pleading is a word-for-word copy of the previous pleading. The Plaintiffs' reply to the Defendants' response to the motion for summary judgment is 5 pages; this does not support the claim of 40-plus hours. The post-trial brief in question is 11 pages, single-spaced. The Court concludes the Plaintiffs' attorneys have allocated unnecessary time to this pleading, as well. Upon careful review of the pleadings in dispute, the Court will exclude: 20 hours of Mr. Smith's time for the reply to Defendants' response to the motion for summary judgment; 18 hours of Mr. Tanner's time and 4 hours of Mr. Smith's time for the trial brief; and 12 hours of Mr. Smith's time for the post-trial brief.

Citizens argue that they may not be assessed any award of attorney fees because they are not state actors and could not be liable under § 1983. In support, they cite *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762-63 (1989), which instructs that fees are not

recoverable against intervenors which have not been found to have violated anyone's civil rights. The Court agrees. No part of the attorneys' fees awarded are assessed against the Defendant-Intervenor. The Commission also argues that it should be responsible for only 50% of any fee award because Citizens played a central role in the litigation and appeal. In response, the Plaintiffs declare that the Commission has submitted no evidence of which party raised what issues on defense, or whether citizens were solely responsible for calling a particular witness, or for defending a particular issue in the case. The Court credits the Plaintiffs' argument, and will assess the attorneys' fee against the Commission Defendants only.

Consistent with the above discussion, the Plaintiffs are awarded attorneys' fees against the Commission Defendants in the following amounts:

Mr. Robert D. Smith III		
Total hours claimed:	587.25	
Hours excluded as excessive:	36.00	
Sub-total:	551.25	
	x.75	
Hours allotted to prevailing issues:	413.50	
Hourly rate	x$200	
Attorney fees awarded:	$81,700	$82,700
Mr. Tom Tanner		
Total hours claimed:	264.00	
Hours excluded as excssive:	18.00	
Sub-total:	246.00	
	x.75	
Hours allotted to prevailing issues:	184.50	
Hourly rate	x $150	
Attorney fees awarded:	$27,675	$27,675

Mr. John R. Pagan		
Total hours claimed:	40.375	
Hourly rate:	x$200	
Attorney fees awarded:	$ 8,075	$8,075
	GRAND TOTAL:	$118,450

The Commission advises it intends to petition the United States Supreme Court for a writ of certiorari. Execution of this Order will be STAYED pending the Supreme Court's disposition of the appeal, either by a denial of the petition or a decision if the writ is granted.

IT IS SO ORDERED this 6th day of August 1998.

/s/ William R. Wilson, Jr.
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 8/10/98 BY LBELL

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1215/1218WAF

Arkansas Right to Life Political Action Committee; David Sloan	*	
Appellees,	*	Appeals from the United States District Court for the Western District of Arkansas
v.	*	
Brad Butler, etc., et al.,	*	
Appellants.	*	

The court grants the appellees' motion for leave to file reply briefs.

The court grants the intervenor/appellants' motion for leave to file a supplemental memorandum.

The court grants in part the appellees' motion for fees and costs. The court awards $219.03 in costs to the appellees, *see* 8th Cir. R. 39A(a), to be assessed only against defendants Butler, Burris, Looney, Allen, Kearney, and Alexander. See *Independent Federation of Flight Attendants v. Zipes*. 491 U.S. 754 (1989). The court denies in all other respects the appellees' original motion for fees and costs. See *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994) aff'd, 75 F.3d 454 (9th Cir. 1996) (*per curiam*).

The court denies the appellees' supplemental motion for fees and costs. *See* 8th Cir. R. 39A(a).

Intervenor's motion for leave to file a brief in reply to appellees' response is denied as moot.

August 18, 1998

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2608WMS

Thomas D. Carver,	*	
Appellant,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
Jeremiah W. Nixon, et al.,	*	
Appellees.	*	

Counsel for the appellant is awarded attorney fees in the amount of $10,980.00 and expenses in the amount of $1,104.86. The clerk of the United States District Court is directed to insert these fees and costs in the previously issued mandate.

February 14, 1996

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 95-2857

Shrink Missouri Government PAC, a political action committee; W. Bevis Shock; Frederick T. Dyer,	*	
Appellees	*	
v.	*	Appeal from the United States District Court for the Eastern District of Missouri.
John Maupin, in his official capacity as Chair of the Missouri Ethics Commission; Jeremiah W. Nixon, in his official capacity as Missouri Attorney General,	*	
Appellants	*	

Filed: February 1, 1996

Before BOWMAN, ROSS, and JOHN R. GIBSON, Circuit Judges.

ORDER

The motion of appellees for the award of attorney fees and costs is granted. Appellees are awarded $4,532.50 for the services of Frank Susman, $4,162.50 for the services of Denise Z. Field, and $18,750 for the services of D. Bruce LaPierre. Appellees are also awarded costs in the amount

of $139.82. Accordingly, appellants shall pay to appellees the total amount of $27,584.82 as attorney fees and costs incurred by appellees in this appeal.

A true copy.

Attest: /s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHRINK MISSOURI GOVERNMENT PAC, et al.,	)	
Plaintiffs,	)	
v.	)	No. 4:95CV815 CDP
JOHN MAUPIN, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on plaintiffs' motion for an award of attorneys' fees pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 54(d)(2). Because plaintiffs' attorneys charged reasonable hourly rates and their total-hour calculation is reasonable, plaintiffs' action will be granted.

Plaintiffs challenged the constitutionality of certain provisions of Missouri Senate Bill 650 and Proposition A, which limited campaign expenditures, amounts candidates could contribute to their own elections, and campaign "War chests", and required certain information to be included in some political advertisements. The court initially granted a temporary restraining order, then a preliminary injunction and then, following an expedited schedule, granted summary judgment to Plaintiffs on all their claims and permanently enjoined enforcement of the statute. The Eighth Circuit Court of Appeals recently affirmed this Court's decision. The primary inquiry in an attorney fees case is whether fee request is "reasonable." *See generally*

Blum v. Stenson, 465 U.S. 886, 893 (1984); *McDonald v. Armontrout*, 860 F.2d 1456, 1458 Cir. 1988). In calculating a reasonable fee, a court must be mindful of Congress' intent to encourage the enforcement of constitutional rights through the award of fees which are "adequate to attract competent counsel, but [which do not] produce windfalls to attorneys." *Blum*, 465 U.S. at 897 (quotation omitted).

The Supreme Court has explained that the proper method for determining a reasonable attorney's fee is to multiply the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986) (quotation omitted). The resulting product, the "lodestar," is presumed to be the reasonable fee to which counsel is entitled. Here, defendants do not challenge this method of calculating the fee award, but rather claim tltat the hourly rates were unreasonably high and that the hours expanded were excessive.

The Supreme Court in *Blum* stated that the awards of attorney fees under § 1888 should be calculated using "market rate" and that the "requested rates (should be) in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, ex-perience, and reputations." *Blum*, 465 U.S. at 895-96; *see also McDonald*, 860 F.2d at 1458-59. In *Delaware Valley*, the Court emphasized the factors which should be issued to set the reasonable number of hours and the reasonable hourly rate components of the fee award formula: (1) The time and labor required, (2) the novelty and difficulty of the question, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent,

(7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorney, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12)adwards in similar cases. 478 U.S. at 565-66; *see also McDonald*, 860 F.2d at 1459 n.4.

Plaintiffs' counsel calculate the attorneys' fees incurred to total $68,581.19. Specifically, Plaintiffs estimate that Frank Susman worked on the case for 67.6 hours – plus 4.8 hours preparing the instant motion – at an hourly rate of $185, for a total of $13,386, and that he incurred costs of $145.19; that Denise Z. Field worked on the case for 109 hours at an hourly rate of $150, for a total of $16,350; and that D. Bruce La Pierre worked an the case for 193.5 hours at an hourly rate of $200, for a total of $38,700.

Applying the *Delaware Valley* factors to the hourly rates charged in the case at bar, the Court first notes that this was a complicated case of first impression. The "campaign reform" statute at issue here contained some provisions that were quite dissimilar to statutes previously challenged in federal courts. Moreover, attorneys Susman, La Pierre, and Field were all experienced attorneys who ultimately assisted their clients in prevailing on all issues raised in this public interest suit. Attorneys Susman, La Pierre, and Field attested in their affidavits that the hourly rates they charged are the same as they typically charge their fee-paying clients; indeed, Susman was awarded attorney's fees calculated at an hourly rate of $185 in another case in 1995. While defendants have presented no evidence showing that attorneys of Susman, La Pierre, or Field's caliber do the type of work involved in this case for a lower fee, there is ample evidence showing that plaintiffs' attorneys were highly experienced and that the hourly rates they charged

in this case are their typical hourly rates. *See McDonald*, 860 F.2d 1456, 1459-60. The Court finds the hourly rates charged by plaintiffs' attorneys here are reasonable.

Defendants challenge the reasonableness of plaintiffs' number of hours on the basis that some of plaintiffs' motions were "frivolous" and "without merit" and plaintiff attorneys' experience in civil rights litigation should have allowed them to do the work in less time. They also argue that Field's participation in the litigation was unreasonable and unnecessary and that various entries by plaintiffs' counsel indicating "meetings" or "strategy conferences" should be deducted from plaintiffs' total hours because there is no evidence for the purpose, reasonableness, and necessity of these telephone calls or conferences. Defendants' arguments lack merit.

First, although the court denied plaintiffs' two motions to strike defendants' papers, the Court by no means found such motions to be "frivolous." Defendants had filed briefs that had not been contemplated by the Court's scheduling order, but which were allowed under the local rules. When plaintiffs sought to strike the brief the Court stated, "Defendants are technically correct, but they have taken advantage of both the Court's and plaintiffs' good faith efforts to resolve this case expeditiously and in the simplest and fairest manner possible." Thus, because defendants were technically correct, the Court did not strike their filings, but plaintiffs' efforts were hardly unreasonable. In any event, the denial of two minor procedural motions does not make plaintiffs any less the prevailing party, and the time spent on those two motions should not be deducted from the fee award. Furthermore, although Denise Field was not counsel of record or licensed in Missouri, she is highly experienced in the area of civil rights and membership to the bar or entry as counsel of record are not requir-

ed before one can recover attorneys' fees. *See generally Missouri v. Jenkins by Agyei*, 491 U.S. 274, 285 (1989) . The evidence shows that her time was reasonable and necessary to the prosecution of the suit.

Defendants also provide no evidence that plaintiffs' telephone conversations and meetings were not useful or not "of a type ordinarily necessary to advance the civil rights litigant[s] under § 1988." *McDonald*, 860 F.2d at 1462 (quotation omitted). Unlike *Bagsby v. St. Louis Bd. of Police Com'rs*, 783 F. Supp. 1214, 1216 (E.D, Mo. 1992), where the court reduced the total number of hours claimed because the time records showed "substantial duplication of efforts," there is no such showing here, and the court finds these meetings were reasonable and necessary in this case. Because "consultations with experts and other attorneys, and research of applicable law," *McDonald*, 860 F.2d at 1462, are the types of preparation needed for this type of specialized litigation involving an issue of first impression, the Court finds plaintiffs' Calculation of the total hours expended on this ultimately successful litigation to be reasonable.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for attorneys' fees and costs [#34-1] is granted, and defendants shall pay to plaintiffs the sun of $67,701.10 as attorneys fees and costs of this action.

/s/ Catherine D. Perry
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of January, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHRINK MISSOURI GOVERNMENT PAC, et al.,	)	
Plaintiffs,	)	
v.	)	No. 4:95CV815 CDP
JOHN MAUPIN, et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court on plaintiffs' motion for supplemental and final award of attorneys' fees pursuant to 42 U.S.C. § 1988. Defendants have not opposed this motion. Plaintiffs were previously awarded attorneys' fees as prevailing party in this Court and by the Court of Appeals when it affirmed the decision of this Court. The United States Supreme Court has now denied defendants' Petition for Certiorari in the case and plaintiffs seek recovery of attorneys' fees pursuant to 42 U.S.C. § 1988 for time and expenses incurred after the award of the Court of Appeals and in opposing the petition for certiorari. The Court has reviewed the request and finds the hourly rates and expenses charged are entirely reasonable. The Court will accordingly grant the motion.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' Motion for supplemental and final award of attorneys' fees [#48-1] is granted.

IT IS FURTHER ORDERED that defendants shall pay to plaintiffs attorneys' fees and costs incurred in the amount of $11,695.95, in addition to the other attorneys' fees awards previously entered.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 31st day of July, 1996.

APPENDIX G

AFFIDAVIT OF D. BRUCE LA PIERRE

Comes now Affiant, D. Bruce La Pierre and states:

1. I was lead counsel for the American Civil Liberties Union of Eastern Missouri and the plaintiffs in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 142-2 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996),

2. In this case, the United States Court of Appeals for the Eighth Circuit held that certain campaign spending limits established by a Missouri statute (Senate Bill 650) and by an initiative measure (Proposition A) violated the First Amendment.

3. Counsel in this case received attorneys' fees and costs under 42 U.S.C. § 19813 for their successful First Amendment challenge both to laws enacted by the legislature and to laws adopted directly by the electorate as an initiative measure, It would have been very difficult, if not impossible, to bring this First Amendment case if attorneys' fees were not available under 42 U.S.C. § 1988.

4. I am also lead counsel in a case that is currently pending in the Eighth Circuit and that raises a First Amendment challenge to limits on campaign contributions imposed by the State of Missouri. *Shrink Missouri Government PAC v. Adams* (No. 98-2351EMSL 8th Circuit).

a. As the State of Missouri recently recognized in that case, there are very few individuals or organizations who are willing to raise a First Amendment challenge to campaign finance Restrictions. Missouri noted, in an attack on the plaintiffs' standing, "the reluctance of real candidates to take the political heat of publicly asking for permission to accept unlimited Contributions," State Appellees Suggestion for *Hearing en banc Shrink Missouri Government*

PAC v. Adams (No. 98-2351EMSL 8th Circuit) (August 7, 1998), denied, Order (August 20, 1998).

b. Absent the availability of attorneys' fees and costs under 42 U.S.C. § 1988, I would not have been able to represent the plaintiffs in this litigation.

/s/ D. Bruce La Pierre
D. Bruce La Pierre, Affiant

COUNTY OF ST. LOUIS)
) SS
STATE OF MISSOURI)

On this 26th day of August, 1998, personally appeared before me the above named Affiant, D. Bruce La Pierre, who being first duly sworn upon his oath and stated that the foregoing statements are true to the best of his knowledge, information and belief and that he executed the same as his free act and deed.

Subscribed and sworn to before me, a Notary Public, on the day and year last above written.

/s/ Lois Love Franklin
Notary Public

Official Notary Seal
Lois Love Franklin
Notary Public State of Missouri
St. Louis City County
My Commission Expires Mar. 12, 1999

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RON RUSSELL, ET AL	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 97-3922/4033/4038
	)	
TROY BURRIS, ET AL	)	
	)	
Appellees.	)	

AFFIDAVIT OF PATRICK DEATON

Comes now Affiant, Thomas Patrick Deaton, Jr., being of legal age and states under oath and penalty of perjury:

1. I am forty-seven years old and live at 1147 South Delaware Avenue, Springfield, Missouri 65804.

2. I was the attorney of record for appellant Thomas D. Carver in Carver v. Nixon, No 95-2606, decided December 19, 1995, and reported at 72 F.3d 633

3. Carver challenged the constitutionality of campaign contribution limits passed by voter initiative (Proposition A) in Missouri in November 1994.

4. Carver challenged the campaign contribution limits by filing a 42 U.S.C. 1983 action in which he alleged that the contribution limits violated his First Amendment freedoms.

5. I received an award of attorney fees ($10,980.00) and expenses ($1,104.86) pursuant to 42 U.S.C. 1988 from the Eighth Circuit on February 14, 1996, after successfully appealing the judgment of the United States District Court

for the Western District of Missouri (Southern Division).

6. I also received an award of attorney fees and expenses for legal work in the district court.

7. The Attorney General of Missouri filed APPELLEES' OBJECTIONS AND RESPONSE TO APPELLANT'S MOTION FOR AWARD OF ATTORNEY FEES AND COSTS in the Eighth Circuit in which Appellees argued that the award of attorney's fees under the special circumstances of Carver was not justified and cited Thorsted v. Gregoire, 841 F. Supp. 1068, 1083 -1085 (W.D. Wash. 1994), in support of their opposition.

THE AFFIANT SAYS NOTHING FURTHER.

COUNTY OF GREENE)
)
STATE OF MISSOURI)

On this 25th day of August 1998, Patrick Deaton personally appeared before me, and being first duly sworn upon his oath, stated that the above and foregoing statements were true to the best of his knowledge, information and belief.

Marl Lynne D. Phillips
Notary Public State of Missouri
Greene County
My Commission expires: July 19, 1999